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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Certification – Construction Industry – Practice and Procedure – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC; RE PAT, LOCAL 1891; File No. 3923-05-R; Dated March 7, 2006; Panel: Harry Freedman (4 pages)

Jurisdictional Dispute – A jurisdictional dispute arose between COPE and the CSU over the assignment of "Network Administrator" work to an employee of CUPE – CUPE argued that the Network Administrator duties fell within the job descriptions for Clerk-Typist and Secretary under the heading "other duties as assigned" – COPE submitted that the employee in question should be reclassified as either a Technology Analyst or a Technical Assistant, both of which fell within the COPE bargaining unit – CSU and ATSU, as an intervenor on behalf of CSU, argued that the Network Administrator duties fell outside the COPE bargaining unit – Moreover, CUPE, CSU and ATSU were parties to an agreement in which work that falls within the ATSU bargaining unit at the National Office of CUPE will fall within the CSU bargaining unit if performed outside the National Office - COPE argued that no reliance should be placed on this agreement as they were not a party to it and that the jurisdictional dispute was only between itself, CSU and CUPE – The Board rejected COPE's argument, holding that reference must be made to the overall collective bargaining relationships – The Board relied on the factors of economy and efficiency, employer past practice and employer preference in declining to change the assignment of work – Work assignment confirmed

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 491; RE CUPE AND CANADIAN STAFF UNION; RE ADMINISTRATIVE AND TECHNICAL STAFF UNION (ATSU); File No. 1887-04-JD; Dated March 2, 2006; Panel: Ian Anderson (15 pages)

Construction Industry – Parties – Related Employer – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind

the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO; LOCAL No. 1634-04-R; Dated March 6, 2006; Panel: Norm Jesin (7 pages)

Construction Industry Grievance – Practice and Procedure – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

LASALLE BACKHOE SERVICES; RE LIUNA LOCAL 625; File No. 3930-05-G; Dated March 10, 2006; Panel: Harry Freedman (2 pages)

Certification – Intimidation and Coercion – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA); File Nos. 2590-05-R; 2784-05-U; Dated March 10, 2006; Panel: Kelly Waddingham (9 pages)

Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the

parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693; File No. 3034-05-U; Dated March 29, 2006; Panel: Brian McLean (19 pages)

Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506; Local Nos. 3060-05-R; 3061-05-U; 3065-05-R; 3232-05-R; 3303-05-R; 3369-05-R; Dated March 21, 2006; Panel: Mary Ellen Cummings (4 pages)

Certification – Fraud – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CARE WORKERS (CHCW); File No. 3336-05-R; Dated March 1, 2006; Panel: Mary Anne McKellar; R. O'Connor; L. Wood (6 pages)

Construction Industry – Construction Industry Grievance – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in

nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC.; RE IUEC LOCAL 96; File No. 2074-05-G; Dated March 17, 2006; Panel: Norm Jesin (6 pages)

Bargaining Rights – Sale of a Business – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700; File No. 1770-03-R; Dated March 3, 2006; Panel: David A. McKee (12 pages)

Duty of Fair Representation – Reconsideration – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

MARK WILSON; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION & GENERAL WORKERS UNION OF CANADA (CAW-CANADA) & ITS LOCAL 222; RE A.G. SIMPSON AUTOMOTIVE SYSTEMS; File No. 0276-05-U; Dated March 14, 2006; Panel: Ian Anderson (2 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Pending
Kostantinos Iaonnidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	Pending
United Brotherhood of Carpenters v. United Brotherhood of Carpenters, Local 93 Divisional Court No. 01/06	2069-05-U; 3055-05-M	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 NEWMARKET	3704-04-U	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Dismissed for Delay Mar. 21, 2006
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Heard - Jan. 27, 2006 - Reserved
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Heard – Feb. 23,24,25,28/05 – Reserved
Naseem Jamal v. OPSEU et al Divisional Court No. 567/04	2464-03-U	Leave to C.A. dismissed Feb. 3/06, seeking leave to SCC